



NYLS Journal of International and Comparative Law

Volume 14
Number 2 *Volume 14, Numbers 2 & 3, 1993*

Article 10

1993

THE EXTRADITION OF JOHN DEMJANJUK AS "IVAN THE TERRIBLE"

Annie Fung

Follow this and additional works at: https://digitalcommons.nyls.edu/journal_of_international_and_comparative_law



Part of the [Law Commons](#)

Recommended Citation

Fung, Annie (1993) "THE EXTRADITION OF JOHN DEMJANJUK AS "IVAN THE TERRIBLE"," *NYLS Journal of International and Comparative Law*: Vol. 14 : No. 2 , Article 10.

Available at: https://digitalcommons.nyls.edu/journal_of_international_and_comparative_law/vol14/iss2/10

This Notes and Comments is brought to you for free and open access by DigitalCommons@NYLS. It has been accepted for inclusion in NYLS Journal of International and Comparative Law by an authorized editor of DigitalCommons@NYLS.

THE EXTRADITION OF JOHN DEMJANJUK AS "IVAN THE TERRIBLE"

I. INTRODUCTION

In *John Demjanjuk v. Joseph Petrovsky*,¹ the United States Court of Appeals for the Sixth Circuit refused to block John Ivan Demjanjuk's extradition to Israel on charges that he was the notorious Nazi concentration camp guard known as "Ivan the Terrible."² The Sixth Circuit affirmed the holding of the United States District Court for the Northern District of Ohio,³ which granted Israel's extradition request for Demjanjuk, a retired Cleveland auto mechanic accused of murdering more than 800,000 people at the World War II Treblinka death camp in Poland.⁴ The Sixth Circuit held that: the evidence presented during the district court trials supported Israel's extradition request;⁵ the charge of mass murder of Jews was within the offense of "murder" for which persons could be extradited under the treaty between the United States and Israel;⁶ the State of Israel had jurisdiction, under the international legal principle of universal jurisdiction, to prosecute Demjanjuk for the alleged murders of thousands of Jews at the Treblinka concentration camp in Poland during World War II;⁷ and the power of Israeli courts to punish Demjanjuk for war crimes committed outside of Israel's territory did not violate his rights under the Federal Constitution.⁸

The holding of this case significantly impacted the due process rights of John Demjanjuk, who was ultimately extradited to Israel for trial and sentenced to death there, because new evidence has recently emerged suggesting that John Demjanjuk may not, in fact, be the infamous "Ivan the Terrible."⁹ There is also proof that the U.S. Justice Department's

1. 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986).

2. *Id.*

3. *In re* Extradition of John Demjanjuk, 612 F. Supp. 544 (N.D. Ohio 1985).

4. *Id.*

5. *Demjanjuk*, 776 F.2d at 577.

6. *Id.*

7. *Id.*

8. *Id.*

9. Jerry Seper, *Two Courts Weigh 'Ivan' Decisions; Cases Could Put Nations in*

Office of Special Investigations, the government's "Nazi hunting unit," withheld evidence in Demjanjuk's favor.¹⁰ The *Demjanjuk* case provided a significant precedent in determining the scope of the United States' international extradition power and the function of the federal courts in extradition proceedings in subsequent extradition cases.¹¹

II. BACKGROUND

A. *Facts of the Case*

The defendant John Demjanjuk was a native of Ukraine, a former Soviet republic.¹² He was admitted to the United States in 1952 under the Displaced Persons Act of 1948¹³ and became a naturalized United States citizen in 1958.¹⁴ Since his arrival in the United States, Demjanjuk has resided in Cleveland, Ohio.¹⁵

In 1981 the United States District Court for the Northern District of Ohio revoked Demjanjuk's certificate of naturalization and vacated the order granting him United States citizenship.¹⁶ The district court's Judge Battisti concluded that the certificate and order "were illegally procured and were procured by willful misrepresentation of material facts under 8 U.S.C. § 145(a)."¹⁷

Through an extensive finding of facts, the district court found that Demjanjuk was conscripted into the Soviet Army in 1940¹⁸ and was captured by the Germans in 1942.¹⁹ After short stays in several German POW camps and a probable stay at the Trawniki SS training camp in Poland,²⁰ the defendant became a guard at the Treblinka concentration

Conflict, WASH. TIMES, Aug. 17, 1992, at A1.

10. *Id.*

11. *Demjanjuk*, 776 F.2d at 571.

12. *United States v. Demjanjuk*, 518 F. Supp. 1362, 1363 (N.D. Ohio 1981), *aff'd*, 680 F.2d 32 (6th Cir. 1982), *cert. denied*, 459 U.S. 1036 (1982).

13. *Id.* at 1380.

14. *Id.*

15. *Demjanjuk*, 776 F.2d at 575.

16. *Demjanjuk*, 518 F. Supp. at 1362.

17. *Id.* at 1386.

18. *Id.* at 1364.

19. *Id.*

20. *Id.*

camp in Poland in late 1942.²¹ In his immigration applications to the United States, Demjanjuk misstated his place of residence during the period from 1937 to 1948 and failed to reveal that he had worked for the German SS at Treblinka or served in a German military unit later in the war.²² In the denaturalization proceedings, he admitted that his statements concerning residence were false and that he did actually serve in a German military unit.²³ Demjanjuk argued that he made these misrepresentations to avoid being repatriated to the Soviet Union because of his prior service in the Russian army.²⁴ Although documentary evidence placed him at Trawniki²⁵ and five Treblinka survivors and one former German guard at the camp identified Demjanjuk as "Ivan the Terrible,"²⁶ Demjanjuk denied that he had been at Trawniki or Treblinka.²⁷

While the United States began deportation proceedings against Demjanjuk pursuant to the denaturalization order,²⁸ the State of Israel filed a request for the extradition of Demjanjuk with the United States Department of State. The United States Attorney for the Northern District of Ohio filed a complaint, on behalf of the State of Israel, in federal court seeking Demjanjuk's arrest and a hearing on the extradition request.²⁹ After the hearing, the district court entered an order certifying to the Secretary of State that Demjanjuk was extraditable at the request of the State of Israel according to the extradition treaty between the United States and Israel signed on December 10, 1962, which became effective December 5, 1963.³⁰ The bond previously granted Demjanjuk was revoked and he was committed to the custody of the United States Attorney General pending the issuance of a warrant of surrender by the Secretary of State.³¹

21. *Id.*

22. *Id.* at 1379.

23. *Id.*

24. *Id.* at 1380.

25. *Id.* at 1365-69.

26. *Id.* at 1369-76.

27. *Id.* at 1376-78.

28. *In re Extradition of John Demjanjuk*, 603 F. Supp. 1463 (N.D. Ohio 1984).

29. *In re Extradition of John Demjanjuk*, 612 F. Supp. 544 (N.D. Ohio 1985).

30. *Id.*

31. *Id.*

B. Procedural History

The United States brought an action under the Immigration and Nationality Act of 1952 in the United States District Court for the Northern District of Ohio to revoke the certificate of naturalization of John Demjanjuk and to vacate the order granting him United States citizenship.³² The district court held that Demjanjuk's failure to disclose his service for the German SS and willful misrepresentation of that service on his visa application was a material misrepresentation.³³ Since Demjanjuk was ineligible for a visa under the Displaced Persons Act, his citizenship was found to be illegally procured and was therefore revoked.³⁴

Demjanjuk appealed and the U.S. Court of Appeals for the Sixth Circuit affirmed the district court's ruling, holding that the evidence was sufficient to sustain the findings that Demjanjuk had willfully concealed that he had trained as an armed guard at a camp run by the German SS and thereafter served with the Nazis as an armed guard at an extermination camp.³⁵ The Sixth Circuit found Demjanjuk's citizenship revoked since it was "illegally procured" and that the district court did not abuse its discretion in denying Demjanjuk's motion for a new trial based on newly discovered evidence.³⁶ The Sixth Circuit held that Demjanjuk was not deprived of due process or a fair trial by the government's failure to pay for his legal fees and expenses.³⁷

The United States, pursuant to the State of Israel's request, filed a complaint seeking extradition of the alleged former concentration camp guard, John Demjanjuk, to Israel.³⁸ The Ohio District Court held that probable cause existed to establish that Demjanjuk was "Ivan the Terrible," as named in the complaint.³⁹ The district court found that charges of murder contained in extradition documents were extraditable offenses pursuant to the U.S.-Israel extradition treaty.⁴⁰ The district court

32. *United States v. Demjanjuk*, 518 F. Supp. 1362 (N.D. Ohio 1981), *aff'd*, 680 F.2d 32 (6th Cir.), *cert. denied*, 459 U.S. 1036 (1982).

33. *Id.*

34. *Id.*

35. *United States v. John Demjanjuk*, 680 F.2d 32 (6th Cir.), *cert. denied*, 459 U.S. 1036 (1982).

36. *Id.*

37. *Id.*

38. *In re Extradition of John Demjanjuk*, 612 F. Supp. 544 (N.D. Ohio 1985).

39. *Id.*

40. *Id.*

also found that competent and sufficient evidence was presented to sustain charges of murder, warranting the extradition of Demjanjuk.⁴¹

Thereafter, Demjanjuk filed a petition for a writ of habeas corpus.⁴² The United States District Court for the Northern District of Ohio entered a memorandum and order which addressed each of the habeas corpus claims and concluded that Demjanjuk was not being held in violation of the Constitution, treaties, or laws of the United States.⁴³

Demjanjuk appealed to the Sixth Circuit of the United States Court of Appeals.⁴⁴ The court affirmed the district court's denial of Demjanjuk's petition and held that the evidence presented during the trial supported Israel's extradition request.⁴⁵ The charge of the mass murder of Jews, the Sixth Circuit found, was within offense of murder for which persons could be extradited pursuant to the U.S.-Israel treaty.⁴⁶ The Sixth Circuit reasoned that Israel had jurisdiction under the international law principle of universal jurisdiction to prosecute Demjanjuk for the alleged murders of thousands of Jews at the Treblinka concentration camp in Poland during World War II. It was also the opinion of the circuit court that recognition by federal courts of the power of Israeli courts to punish Demjanjuk for war crimes committed outside of Israeli national territory did not violate his rights under the Constitution.⁴⁷

The objective of this Comment is to analyze the Sixth Circuit's decision authorizing Demjanjuk's extradition to Israel, which was the last of the string of cases that led up to Demjanjuk's extradition.⁴⁸

III. ANALYSIS OF THE CASE

The analysis of the case can be broken down into the following issues: (1) the scope of review through habeas corpus, (2) the sufficiency of evidence and recusal, (3) the mass murder of Jews falling within the

41. *Id.*

42. *Demjanjuk v. Petrovsky*, 612 F. Supp. 571 (N.D. Ohio), *aff'd*, 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986).

43. *Id.*

44. *Demjanjuk v. Petrovsky*, 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986).

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

offense of murder as listed in the U.S.-Israel extradition treaty and the double criminality requirement, (4) the territorial reach of Israeli statutory law, (5) the alleged violation of Demjanjuk's constitutional rights, and (6) the principle of specialty.

A. The Scope of Review Through Habeas Corpus

The absence of a direct appeal from an extradition order limits review to collateral habeas corpus proceedings.⁴⁹ The scope of review through habeas corpus stemming from an extradition order is narrow.⁵⁰ The habeas corpus proceeding is not a means for rehearing what has been decided by the lower district court. It is available to inquire whether the lower court had jurisdiction, whether the offense charged is within the treaty, and whether there was sufficient evidence to support a finding of probable cause.⁵¹

B. The Sufficiency of Evidence and Recusal

In an extradition hearing, the district judge need not find that the evidence is sufficient to convict an individual whose extradition is sought but only whether there is "probable cause" or "reasonable grounds" to believe the individual is guilty of the crime charged.⁵² The government need only make out a *prima facie* case to establish identification.⁵³ The only evidentiary function of the Demjanjuk extradition court was to determine whether there was probable cause to find that Demjanjuk was the individual who was charged with the crimes alleged by Israel and whether there was sufficient evidence to justify extraditing Demjanjuk to stand trial in Israel.⁵⁴

49. *Collins v. Miller*, 252 U.S. 364 (1920); *Caplan v. Vokes*, 649 F.2d 1336 (9th Cir. 1981).

50. *Demjanjuk v. Petrovsky*, 776 F.2d 571, 576 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986).

51. *Fernandez v. Phillips*, 268 U.S. 311 (1925); *Benson v. McMahon*, 127 U.S. 457 (1888); *In re Luis Oteiza y Cortes*, 136 U.S. 330 (1890); *Bryant v. United States*, 167 U.S. 104 (1897); *Elias v. Ramirez*, 215 U.S. 398 (1910).

52. *Fernandez v. Phillips*, 268 U.S. 311 (1925).

53. *Argento v. Jacobs*, 176 F. Supp. 877 (N.D. Ohio 1959); *Fong v. Bligh*, 55 F.2d 189 (1st Cir. 1932); *Hooker v. Klein*, 573 F.2d 1360 (9th Cir. 1978); *In re Assarsson*, 635 F.2d 1237 (7th Cir. 1980).

54. *Demjanjuk*, 776 F.2d at 576.

The evidence that the district court relied on consisted of sworn testimony⁵⁵ and an identification card from the SS training camp Trawniki.⁵⁶ The sworn testimony by affidavits was given by six witnesses who were present at Treblinka in 1942 and 1943.⁵⁷ These six witnesses were five Jewish survivors and a German guard. After viewing a 1952 visa application photo of Demjanjuk,⁵⁸ the six witnesses identified Demjanjuk as the guard "Ivan the Terrible," who herded prisoners into the gas chambers and then actually activated the chambers.⁵⁹ The eyewitnesses also identified Demjanjuk as Ivan the Terrible, who had killed, beaten, and abused Jewish prisoners at Treblinka.⁶⁰ The front and back of a German identification card identified Demjanjuk as having been at the SS training camp Trawniki.⁶¹ The card identified "Iwan Demjanjuk" as a guard in an SS unit, and the heading indicated that it was issued at Trawniki.⁶² The district court rejected Demjanjuk's contentions that the Trawniki card was forged and that the government perpetrated a fraud upon the court by introducing them.⁶³ Judge Lively of the Sixth Circuit pointed out that the district court found the other evidence, identifying Demjanjuk as the guard Ivan at Treblinka, enough to support the extradition order without reliance on the Trawniki identification card.⁶⁴ Consequently, even if the card was rejected as evidence, the eyewitness evidence alone was found sufficient.⁶⁵ Thus, Judge Lively did not consider the validity of the card since the district court did not rely on it.⁶⁶ Judge Lively asserted that since there was no support in the record for Demjanjuk's claim that the government deliberately submitted a forged

55. *United States v. Demjanjuk*, 518 F. Supp. 1362, 1369 (N.D. Ohio 1981), *aff'd*, 680 F.2d 32 (6th Cir. 1982), *cert. denied*, 459 U.S. 1036 (1982).

56. *Id.* at 1365.

57. *Id.* at 1369.

58. *Id.* at 1371-76.

59. *Id.* at 1370.

60. *Id.*

61. *Id.* at 1365-66.

62. *Id.*

63. *Id.* at 1365-69.

64. *Demjanjuk v. Petrovsky*, 776 F.2d 571, 577 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986).

65. *Id.*

66. *Id.*

identification card as evidence, the circuit court rejected Demjanjuk's charge of fraud.⁶⁷

The circuit court concluded that the evidence presented was sufficient to satisfy the lenient "probable cause/reasonable grounds" standard.⁶⁸ Consequently, the circuit court did not rehear the district court's findings.⁶⁹ The Court of Appeals also found that the evidence upon which the district court relied was properly authenticated, pursuant to Section 3190 of Title 18 of the United States Code,⁷⁰ by an official of the United States Department of State.⁷¹ Consequently, the Court of Appeals was

67. *Id.*

68. *Id.* at 576.

69. *Escobedo v. United States*, 623 F.2d 1098, 1101 (5th Cir. 1980).

70. 18 U.S.C. § 3190 (1982) provides:

Depositions, warrants, or other papers or copies thereof offered in evidence upon the hearing of any extradition case shall be received and admitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that the same, so offered, are authenticated in the manner required.

Id.

71. *In re Extradition of John Demjanjuk*, 612 F. Supp. 544, 547 (N.D. Ohio 1985).

The [United States] Government submitted four exhibits. They are:

a set of documents, filed November 18, 1983, entitled "State of Israel/Ministry of Justice/Request for the Extradition of John Demjanjuk" [previously cited as "Israeli Extradition Request"] [Government Exhibit 1];

a set of documents, filed January 30, 1984, entitled "State of Israel/Supplement to the Request for the Extradition of John Demjanjuk" [Government Exhibit 2];

a set of documents, filed March 2, 1984, entitled "State of Israel/Additional Supplement to the Request for the Extradition of John Demjanjuk" [Government Exhibit 3];

a document filed, November 18, 1983, entitled "Declaration of Jeffrey H. Smith [Assistant Legal Adviser, United States Department of State]" [Government Exhibit 4].

. . . James F. Hughes III, Consul General of the United States of America at Tel Aviv, Israel . . . certified Government Exhibits 1-3 as "authenticated documentary evidence." Consul General Hughes certified and placed the seal of his office on Government Exhibit 1 on November 3, 1983 Government Exhibits 2 and 3 were similarly certified by Hughes on January 12, 1984; and February 9, 1984 respectively. Government Exhibit 4 is certified with the seal of the United States Department of State by Secretary of State George Schultz through Acting Authentication Officer Joan C.

satisfied that the district court used admissible evidence in determining whether Demjanjuk was the Ivan the Terrible named in the complaint.⁷²

The Sixth Circuit also rejected Demjanjuk's argument that district court Judge Battisti, having presided at the denaturalization proceedings, should have recused himself from the extradition hearing.⁷³ Relying on Section 455(a) of Title 28 of the United States Code which requires a judge to disqualify himself "in any proceeding in which his impartiality might reasonably be questioned," Demjanjuk contended that Judge Battisti, having found that Demjanjuk committed acts that justified his denaturalization, might reasonably be biased against him in the subsequent extradition hearing.⁷⁴ Judge Lively held that in order to be disqualifying, a judge's alleged bias must emanate from some "extrajudicial source," rather than from participation in judicial proceedings.⁷⁵ Recusal was not required of a judge assigned to decide a habeas corpus action after conviction at a trial over which the judge presided.⁷⁶ The circuit court asserted that Rule 4(a) of Section 2255 of Title 28 of the United States Code requires that a petition seeking habeas relief from a federal conviction be presented to the judge who presided over the petitioner's trial.⁷⁷ According to the Sixth Circuit, judicial economy is served by requiring a judge conversant with the case to consider collateral attacks on the judgment.⁷⁸ The Sixth Circuit contended that in the absence of evidence of actual bias or prejudice from some source other than his prior judicial contact with Demjanjuk's denaturalization case, Rule 4(a) did not require Judge Battisti to disqualify himself from the extradition proceedings.⁷⁹

Hampton; it was sealed November 17, 1983.

Respondent has not questioned the certification and authenticity of the evidence against him submitted by the Government in the extradition matter.

Id.

72. *Demjanjuk v. Petrovsky*, 776 F.2d 571, 576 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986).

73. *Id.* at 577.

74. *Id.*

75. *United States v. Grinnell Corp.*, 384 U.S. 563 (1966).

76. *Demjanjuk*, 776 F.2d at 577.

77. *Id.*

78. *Id.*

79. *David v. Attorney General*, 699 F.2d 411, 416 (7th Cir. 1983).

C. The Mass Murder of Jews Falling Under the United States-Israel Extradition Treaty and the Double Criminality Requirement

The Israeli warrant on which Demjanjuk's extradition request was based was issued pursuant to a 1950 Israeli statute, the Nazis and Nazi Collaborators (Punishment) Law, which made "crimes against the Jewish people," "crimes against humanity," and "war crimes committed during the Nazi period" punishable under Israeli law.⁸⁰ The warrant charged Demjanjuk with having "murdered tens of thousands of Jews and non-Jews" while operating the gas chambers to exterminate prisoners at Treblinka and stated that the acts charged were committed "with the intention of destroying the Jewish people and to commit crimes against humanity."⁸¹ The district court complaint equated this charge with the

80. Nazis and Nazi Collaborators (Punishment) Law, 5710-1950 (1950) (Israel [hereinafter Nazi Statute]). In 1950, the Nazi Statute was passed by the Israeli Knesset on the 18th Av, 5710 (1st August, 1950), and published in Sefer Ha-Chukkim No. 57 of the 26th Av, 5710 (9th August, 1950) p.281. The statute considered crimes against the Jewish people, crimes against humanity, and acts constituting war crimes which occurred during the Nazi period punishable under Israeli law. Section 1(b) of the Nazi Statute provides that:

"Crime against the Jewish people" means any of the following acts, committed with intent to destroy the Jewish people in whole or in part:

1. killing Jews;
2. causing serious bodily or mental harm to Jews;
3. placing Jews in living conditions calculated to bring about their physical destruction;
4. imposing measures intended to prevent births among Jews;
5. forcibly transferring Jewish children to another national or religious group;
6. destroying or desecrating Jewish religious or cultural assets or values;
7. inciting to hatred of Jews;

Id.

"Crime against humanity" means any of the following acts:

murder, extermination, enslavement, starvation or deportation and other inhumane acts committed against any civilian population, and persecution on national, racial, religious or political grounds;

Id.

"War crime" means any of the following acts:

murder, ill-treatment or deportation to forced labour or for any other purpose, of civilian population of or in occupied territory; murder or ill-treatment of prisoners of war or persons on the seas; killing of hostages; plunder of public or private property; wanton destruction of cities, towns, or villages; and devastation not justified by military necessity.

Id.

81. *In re Extradition of John Demjanjuk*, 612 F. Supp. 544, 560 (N.D. Ohio 1985).

crimes of "murder and malicious wounding and inflicting grievous bodily harm," listed in article II of the U.S.-Israel extradition treaty.⁸²

The Warrant Request-Exhibit J sets forth the following charges:

Details of the offense(s): The suspect, nicknamed "Ivan the Terrible," was a member of the S.S., and in the years 1942-1943 operated the gas chambers to exterminate prisoners at the Treblinka death camp in the Lublin area of Poland, which was occupied by the Nazis during the Second World War. The suspect murdered tens of thousands of Jews, as well as non-Jews, killing them, injuring them, causing them serious bodily and mental harm and subjected them to living conditions calculated to bring about their physical destruction. The suspect committed these acts with the intention of destroying the Jewish people and to commit crimes against humanity.

Id.

82. Convention Relating to Extradition, U.S.-Israel, Dec. 10, 1962, 14 U.S.T. 1707 [hereinafter Extradition Convention]. The relevant portions of the Extradition Convention between the United States and Israel are contained in the first three articles and the thirteenth article as follows:

Article I

Each Contracting Party agrees, under the conditions and circumstances established by the present Convention, reciprocally to deliver up persons found in its territory who have been charged with or convicted of any of the offenses mentioned in Article II of the present Convention committed within the territorial jurisdiction of the other, or outside thereof under the conditions specified in Article III of the present Convention.

Id.

Article II

Persons shall be delivered up according to the provisions of the present Convention for prosecution when they have been charged with, or to undergo sentence when they have been convicted of, any of the following offenses:

1. Murder.
2. Manslaughter.
3. Malicious wounding; inflicting grievous bodily harm.

Id.

Article III

When the offense has been committed outside the territorial jurisdiction of the requesting Party, extradition need not be granted unless the laws of the requested Party provide for the punishment of such an offense committed in similar circumstances.

The words "territorial jurisdiction" as used in this Article and in Article I of the present Convention mean: territory, including territorial waters, and the airspace thereover belonging to or under the control of one of the Contracting Parties, and vessels and aircraft belonging to one of the Contracting Parties or to a citizen or corporation thereof when such vessel is on the high seas or such aircraft is over the high seas.

Id.

International extradition requires that the crime for which extradition is sought be one provided for by the treaty between the requesting and requested nation.⁸³ Demjanjuk first argued that the district court had no jurisdiction to consider Israel's extradition request because the crime that he was charged with was not included in the list of offenses in the treaty. Demjanjuk contended that "murdering tens of thousands of Jews and non-Jews" was not covered by the treaty's provision of "murder" in article II.⁸⁴ The Sixth Circuit rejected this contention and concluded that murder encompassed the mass murder of Jews.⁸⁵ Judge Lively asserted that equating murder with the mass murder of Jews was a logical reading of the treaty language and was the same interpretation that the Department of State gave to the treaty,⁸⁶ an interpretation entitled to considerable deference.⁸⁷ Quoting *Charlton v. Kelly*, the Sixth Circuit found that treaty interpretation by the political department of the government, while not binding on a court, was nevertheless given much weight.⁸⁸

Demjanjuk's second argument in support of his position that the district court had no jurisdiction to consider Israel's extradition request was that the "double criminality" requirement in international extradition cases was not satisfied.⁸⁹ An offense is extraditable only if the acts charged are criminal according to the law of both the requesting and requested countries.⁹⁰ The Supreme Court, in *Collins v. Loisel*, stated:

the law does not require that the name by which the crime is described in the two countries shall be the same; nor that the

Article XIII

A person extradited under the present Convention shall not be detained, tried or punished in the territory of the requesting Party for any offense other than that for which extradition has been granted nor be extradited by that Party to a third State unless:

(Exceptions not applicable).

Id.

83. 18 U.S.C. § 3184 (1982); *Fernandez v. Phillips*, 268 U.S. 312 (1925).

84. Extradition Convention, *supra* note 82.

85. *Demjanjuk v. Petrovsky*, 776 F.2d 571, 579 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986).

86. *Id.*

87. *Argento v. Horn*, 241 F.2d 258, 263 (6th Cir. 1957).

88. *Charlton v. Kelly*, 229 U.S. 447, 468 (1913).

89. *Demjanjuk*, 776 F.2d at 579.

90. *Collins v. Loisel*, 259 U.S. 309, 311 (1922); *Baruch v. Raiche*, 618 F.2d 843, 847 (1st Cir. 1980).

scope of the liability shall be coextensive, or, in other respects, the same in the two countries. It is enough that the particular act charged is criminal in both jurisdictions.⁹¹

Judge Lively held that murder was a crime in every state of the United States, and it was irrelevant that there was no separate offense of mass murder or murder of tens of thousands of Jews in this country.⁹² The act of unlawfully killing one or more persons with the requisite malice was punishable as murder.⁹³ Because murder was a criminal act both in Israel and throughout the United States, including Ohio, the Sixth Circuit concluded that the double criminality requirement was satisfied in this case.⁹⁴

D. The Territorial Reach of Israeli Statutory Law

Demjanjuk contested the territorial reach of Israeli statutory law by relying on the facts that he was not a citizen or resident of Israel and that the crimes with which he was charged were committed in Poland.⁹⁵ He further noted that the acts which were the basis of the Israeli arrest warrant allegedly occurred in 1942 and 1943, before Israel became a state.⁹⁶ Consequently, Demjanjuk contended that the district court had no jurisdiction since Israel did not charge him with extraditable offenses.⁹⁷ The Sixth Circuit relied on Section 3184 of Title 18 of the United States Code⁹⁸ to define the scope of the United States' international extradition

91. *Collins v. Loisel*, 259 U.S. at 312. Plaintiff Collins appealed from a Louisiana District Court order extraditing him to India under the treaties with Great Britain. *Id.* at 310. He contended that the affidavit of the British Consul General did not charge an extraditable offense. *Id.* at 311. His argument was that the affidavit merely charged him with cheating, and that cheating was not among the offense enumerated in the extradition treaties. *Id.* Collins argued that cheating is a different offense from obtaining property under false pretenses, which is specified in the Treaty of December 13, 1900, 32 Stat. 1864. *Id.* The *Collins* Court held that the cheating offense with which Collins was charged was extraditable. *Id.* at 312. The Court felt that the law did not require that the name by which the crime of cheating was described in India and Louisiana be the same. *Id.* It was sufficient if the act of cheating was criminal in both India and Louisiana. *Id.*

92. *Demjanjuk*, 776 F.2d at 580.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. 18 U.S.C. § 3184 (1982). Fugitives from foreign country to United States:

power and the function of the federal courts in extradition proceedings.⁹⁹ Section 3184 requires that the extradition complaint charge the person to be extradited with crimes committed "within the jurisdiction of any such foreign government," which is the requesting state.¹⁰⁰ Similarly, Section 486(a) of the *Restatement (Third) of Foreign Relations Law* requires the requested state to comply with the request to arrest and deliver a person sought "on charges of having committed a serious crime within the jurisdiction of the requesting state."¹⁰¹ Thus, the issue before the Sixth Circuit was whether the murder of Jews in a Nazi extermination camp in Poland from 1939 to 1945 could be considered, for extradition purposes, crimes within Israel's jurisdiction.¹⁰²

The *Demjanjuk* court first examined article III of the treaty, which provides that when an offense has been committed outside the territorial jurisdiction of the requesting party, "extradition need not be granted unless the laws of the requested party provide for the punishment of such an offense committed in similar circumstances."¹⁰³ *Demjanjuk* relied on the "need not" language of article III in support of his position that extradition was improper since United States law did not provide punishment for war

Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate, to the end that the evidence of criminality may be heard and considered If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

Id.

99. *Demjanjuk*, 776 F.2d at 580.

100. *Id.*

101. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 486 (1987).

102. *Demjanjuk*, 776 F.2d at 580.

103. Extradition Convention, *supra* note 82.

crimes or crimes against humanity.¹⁰⁴ In support of this proposition, Demjanjuk cited *Valentine v. United States ex rel. Neidecker*.¹⁰⁵ In that case, the treaty clause at issue read: "neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention."¹⁰⁶ The *Valentine* Court held that this language did not afford the government the discretion to extradite United States citizens.¹⁰⁷ Thus, Demjanjuk maintained, the "need not" language in the treaty here also deprived the government of the discretion to extradite for any offense for which United States laws provide no punishment under similar circumstances.¹⁰⁸

The Sixth Circuit countered Demjanjuk's argument by citing *In re Assarsson*,¹⁰⁹ where similar arguments were made by the petitioners. In *Assarsson*, two brothers were charged in Sweden with several crimes, including a plan to defraud an insurance company by setting fire to a warehouse in Copenhagen, Denmark.¹¹⁰ The extradition treaty between the United States and Sweden contained language identical to that in article III of the U.S.-Israel treaty.¹¹¹ The Seventh Circuit in *Assarsson* interpreted the "need not" language as permitting a government the discretion to extradite even if the laws of the requested nation do not provide punishment for offenses on which extradition was based.¹¹² The *Assarsson* Court distinguished *Valentine* as involving an extraordinary treaty that prohibited the extradition of United States citizens rather than to grant discretion to extradite.¹¹³ The Seventh Circuit reasoned that the treaty did not grant discretion because it was silent on this issue, while many other treaties expressly granted discretion.¹¹⁴ The Eighth Circuit in *Assarsson* agreed with the Seventh Circuit's construction in upholding the denial of habeas corpus relief to the second brother.¹¹⁵ The Sixth Circuit

104. *Demjanjuk*, 776 F.2d at 580-81.

105. 299 U.S. 5 (1936).

106. *Valentine*, 299 U.S. at 7.

107. *Id.*

108. *Demjanjuk*, 776 F.2d at 581.

109. 635 F.2d 1237 (7th Cir. 1980), *cert. denied*, 451 U.S. 938 (1981); *In re Assarsson*, 687 F.2d 1157 (8th Cir. 1982), *cited in Demjanjuk*, 776 F.2d at 581.

110. *Assarsson*, 687 F.2d at 1157.

111. *Id.*

112. *Assarsson*, 635 F.2d at 1237.

113. *Id.* at 1245.

114. *Id.*

115. *Assarsson*, 687 F.2d at 1157.

in *Demjanjuk*, relying on the *Assarsson* Court's construction concluded that the Israeli Treaty implied that: (1) the parties recognize the right to request extradition for extra-territorial crimes, and (2) the requested party has the discretion to deny extradition if its laws do not provide for punishment of offenses committed under similar circumstances.¹¹⁶ This provision, the *Demjanjuk* court noted, did not affect the court's authority to certify extraditability, but rather distinguished between cases where the requested party was required to honor a request and those where it had discretion to deny a request.¹¹⁷ The fact that the specific offense charged was not a crime in the United States did not preclude extradition.¹¹⁸

Under the 1950 Israeli statute, the Nazis and Nazi Collaborators (Punishment) Law,¹¹⁹ *Demjanjuk* was charged with "crimes against the Jewish people," "crimes against humanity," and "war crimes" committed during the Nazis years. The Sixth Circuit inferred, from the language of the statute, that Israel intended to punish those who participated in expediting Hitler's "final solution."¹²⁰ Claims of extraterritorial jurisdiction over criminal offenses are not unique to Israel.¹²¹ Judge Lively pointed to examples of United States statutes that provide for punishment in domestic district courts for murder or manslaughter committed within the maritime jurisdiction¹²² and murder or manslaughter of internationally-protected individuals wherever they are killed.¹²³ Thus, the Sixth Circuit concluded that the reference in Section 3184 of Title 18 of the United States Code to crimes committed within the requesting government's jurisdiction did not refer only to territorial jurisdiction, but rather to the authority of a nation to apply its laws to specific conduct.¹²⁴

The Supreme Court in *The Paquete Habana* stated that United States law encompassed international law.¹²⁵ International law provides for "universal jurisdiction" to define and punish certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and acts

116. *Demjanjuk*, 776 F.2d at 581.

117. *Id.*

118. *Id.*

119. Nazi Statute, *supra* note 80.

120. *Demjanjuk*, 776 F.2d at 581.

121. *Id.*

122. 18 U.S.C. § 1111 (1982).

123. 18 U.S.C. § 1116(c) (1982).

124. *Demjanjuk*, 776 F.2d at 582.

125. *The Paquete Habana*, 175 U.S. 712 (1900).

of terrorism.¹²⁶ The “universality principle” is based on the premise that some crimes are so universally condemned that the perpetrators are the enemies of all humanity.¹²⁷ Thus, any nation that has custody of the perpetrators may punish them according to its law applicable to such offenses.¹²⁸ The World War II Allies set up the International Military Tribunal, which tried major Nazi officials at Nuremberg, and courts within the four occupied zones of post-war Germany, which tried lesser offending Nazis.¹²⁹ All were tried for committing war crimes, and universal jurisdiction provided the basis for the creation of these tribunals and their proceedings.¹³⁰

Judge Lively rejected Demjanjuk’s argument that the post-war trials were all based on the military defeat of Germany and that with the disassembly of the special tribunals there are no courts with jurisdiction over alleged war crimes.¹³¹ The Sixth Circuit maintained that the post-war tribunals were not military courts and did not operate within the limits of traditional military courts.¹³² The *Demjanjuk* Court, relying on section 443 of the restatement,¹³³ maintained that these tribunals claimed and exercised a broader jurisdiction that derived from the universality principle, which provided for jurisdiction over types of crimes that extend beyond the territorial limits of any nation.¹³⁴

The Sixth Circuit reasoned that since Israel was seeking to enforce its criminal law for the punishment of Nazis and Nazi collaborators for crimes universally recognized and condemned by the community of nations, it did not lack the authority to try Demjanjuk merely because he was charged with committing these offenses in Poland.¹³⁵ The Sixth Circuit found that the nonexistence of the State of Israel at the time of

126. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1987).

127. *Demjanjuk*, 776 F.2d at 582.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 443 (1987). Jurisdiction to Adjudicate in Aid of Universal and Other Non-Territorial Crimes provided that: A state’s courts may exercise jurisdiction to enforce the state’s criminal laws which punish universal crimes (§404) or other non-territorial offenses within the state’s jurisdiction to prescribe (§§ 402-403). *Id.*

134. *Demjanjuk*, 776 F.2d at 582.

135. *Id.*

Demjanjuk's alleged offenses did not bar Israel from exercising jurisdiction under the universality principle, which rendered the nationality of the accused, the nationality of the victim(s), or the location of the crime insignificant.¹³⁶ The basic premise was that the crimes were offenses against the law of nations or against humanity so that the prosecuting nation was acting on behalf of all nations.¹³⁷ This assumption, the Sixth Circuit found, provided the justification for Israel, or any other nation, regardless of its status in 1942 or 1943, to punish anyone who committed such universally condemned crimes in order to vindicate the interest of all nations.¹³⁸

Thus, the Sixth Circuit concluded that Demjanjuk's jurisdictional challenges to the district court's order could not stand.¹³⁹ Murder is a crime for which extradition may be granted under the treaty between the United States and Israel.¹⁴⁰ Furthermore, both United States and Israeli domestic law include murder as a crime, as well as the Israeli Nazis and Nazi Collaborators (Punishment) Law.¹⁴¹ Finally, Judge Lively rejected Demjanjuk's challenge because the requirement of "double criminality" was met, and the Sixth Circuit held that Israel had jurisdiction to punish for war crimes and crimes against humanity committed outside of its national territory.¹⁴²

E. Violation of Demjanjuk's Constitutional Rights

The Sixth Circuit deliberated on whether the recognition of Israel's jurisdiction to punish for war crimes committed outside of its geographical boundaries violated Demjanjuk's constitutional rights even though this argument was not made by Demjanjuk's counsel.¹⁴³ Judge Lively found that Demjanjuk's rights were not violated, since Demjanjuk had notice before he applied for citizenship in the United States that this country, by participating in post-war trials of German and Japanese war criminals, recognized the universality principle.¹⁴⁴ The court maintained that it

136. *Id.* at 582-83.

137. *Id.* at 583.

138. *Id.*

139. *Id.*

140. Extradition Convention, *supra* note 82.

141. Nazi Statute, *supra* note 80.

142. *Demjanjuk*, 776 F.2d at 583.

143. *Id.*

144. *Id.*

would not interfere with the Israeli judicial system's decision to proceed under the universality principle.¹⁴⁵ To do so "would directly conflict with the principle of comity upon which extradition is based."¹⁴⁶ The Sixth Circuit held that since there was no indication that Demjanjuk would be subjected to procedures "antipathetic to a federal court's sense of decency,"¹⁴⁷ there would be no need to inquire into the proceedings that would be taken against Demjanjuk after his surrender to Israel.¹⁴⁸ Judge Lively was convinced that nothing in the record indicated that Israel would engage in proceedings that would shock the court's "sense of decency."¹⁴⁹

F. The Principle of Specialty

Demjanjuk argued that the "principle of specialty," which requires the requesting country not prosecute for crimes in the treaty but those for which extradition was granted, should be applicable to this case.¹⁵⁰ Article XIII of the treaty also expressly provides that the extradited individual be tried or punished by the requesting party only for offenses for which extradition was granted.¹⁵¹ Since the district court certified that Demjanjuk was extraditable solely on the charge of murder, he should be tried in Israel only on that charge, even though he was charged with other offenses listed in the treaty.¹⁵² However, the Sixth Circuit maintained that the specific acts of murder for which he may be prosecuted depended upon Israeli law.¹⁵³ Israel may prosecute him under the provisions of the Nazis and Nazi Collaborators (Punishment) Law¹⁵⁴ for "crimes against the Jewish people" ("killing Jews" is a species of murder), "crimes against humanity" ("murder of civilian population") and "war crimes" ("murder of civilian population of or in occupied territory"). Judge Lively held that the principle of specialty did not limit the specifics of the charge so long

145. *Id.*

146. *Jhirad v. Ferrandina*, 536 F.2d 478 (2d Cir. 1976).

147. *Gallina v. Fraser*, 278 F.2d 77, 79 (2d Cir.), *cert. denied*, 364 U.S. 851 (1960).

148. *Demjanjuk*, 776 F.2d at 583.

149. *United States ex rel. Bloomfield v. Gengler*, 507 F.2d 925, 928 (2d Cir. 1974).

150. *Shapiro v. Ferrandina*, 478 F.2d 894, 905 (2d Cir. 1973), *cert. dismissed*, 414 U.S. 884 (1973).

151. Extradition Convention, *supra* note 82.

152. *Demjanjuk*, 776 F.2d at 583.

153. *Id.*

154. Nazi Statute, *supra* note 80.

as it encompassed only the crime of murder for which Demjanjuk's extradition was granted.¹⁵⁵ In conclusion, the Sixth Circuit found that the right to assert the principle of specialty rested with the United States, the requested state, and not with Demjanjuk, the one whose extradition was requested.¹⁵⁶

IV. CONCLUSION

The United States Court of Appeals for the Sixth Circuit affirmed the denial of the United States District Court for the Northern District of Ohio of Demjanjuk's petition for writ of habeas corpus.¹⁵⁷ The Sixth Circuit found that under international law Israel's request for Demjanjuk's extradition fell within the treaty's provisions.¹⁵⁸ The Court of Appeals maintained that the district court properly determined that it had jurisdiction over the subject matter, and that the evidence presented was sufficient to justify the charge as delineated in Section 3184 of Title 18 of the United States Code.¹⁵⁹ The circuit court also concluded that the district court correctly certified to the Secretary of State that Demjanjuk was extraditable to Israel.¹⁶⁰

Judge Lively held that since extradition was an act of the executive branch, neither the district court nor the Sixth Circuit had any power to extradite an individual.¹⁶¹ "The ultimate decision to extradite is a matter within the exclusive prerogative of the Executive in the exercise of its powers to conduct foreign affairs."¹⁶² Thus, the attachment of conditions to an extradition order was within the Secretary of State's discretion, not the courts.¹⁶³

V. THE DEMJANJUK AFTERMATH

After the Sixth Circuit of the United States Court of Appeals affirmed his extradition, Demjanjuk was extradited to Israel, where he was tried,

155. *Demjanjuk*, 776 F.2d at 583.

156. *Berenguer v. Vance*, 473 F. Supp. 1195, 1197 (D.D.C. 1979); *Shapiro*, 478 F.2d at 906.

157. *Demjanjuk*, 776 F.2d at 583.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Escobedo v. United States*, 623 F.2d 1098, 1105 (5th Cir. 1980).

163. *Demjanjuk*, 776 F.2d at 583.

convicted, and sentenced to death for the crimes of Ivan the Terrible in April 1988.¹⁶⁴ On August 11, 1992, Demjanjuk's counsel charged that the United States Justice Department's Office of Special Investigation withheld evidence that showed that his client was not Ivan the Terrible¹⁶⁵ and if presented might have prevented his extradition.¹⁶⁶ Demjanjuk's lawyer petitioned the United States Court of Appeals for the Sixth Circuit to vacate the orders stripping Demjanjuk of his citizenship and extraditing him to Israel.¹⁶⁷ They also asked that the circuit court direct the United States Secretary of State to request that Israel return Demjanjuk to the United States.¹⁶⁸

164. Sharon LaFraniere, *Oversights in Nazi Probe: Did Omission of Evidence Hurt Demjanjuk?*, WASH. POST, July 28, 1992, at A1 [hereinafter LaFraniere, *Oversights*].

165. After Demjanjuk's extradition in 1986, his supporters went through the discarded documents in the Justice Department's garbage bins to find evidence that might have prevented Demjanjuk's extradition. Tamar Lewin, *Family of War-Crime Suspect Recounts its Trial by Ordeal*, N.Y. TIMES, June 15, 1992, at A1. They found leads to Soviet documents indicating that Ivan Marchenko, another Ukrainian, whose whereabouts were still unknown, was known to other Treblinka guards as the sadistic Ivan, who slashed Jews as he forced them into the gas chambers. *Id.* In another garbage bag, the Demjanjuk supporters found an account of the Justice Department's interview with a man who had worked alongside Ivan the Terrible at Treblinka. *Id.* The report indicated that the man had initially been unable to identify Demjanjuk in photographs, and that he was subsequently led to do so after the photographs were displayed in a way that clearly singled out Demjanjuk. *Id.* The man was shown two sets of pictures; Demjanjuk's face appeared in both sets, the first was left face up as the man examined the second set. *Id.*

Statements taken from thirty-seven captured Red Army soldiers have recently been discovered. David Grogan, *Reasonable Doubt: New Evidence in Case of Convicted Nazi War Criminal John Demjanjuk*, PEOPLE WEEKLY, June 22, 1992, at 125. The soldiers were captured by the Nazi's during World War II, and forced to serve as camp guards at Treblinka. *Id.* Each of these statements identified a fellow guard named Ivan Marchenko as Ivan the Terrible. *Id.* He was described as a thirty year old man of medium build, with dark hair, brown eyes, and a long scar on his neck. *Id.* Ivan Demjanjuk, however, was in his early twenties at the time, with a stocky build, blonde hair, blue eyes, and no scar on his neck. *Id.*

In December 1987, Demjanjuk's family obtained, through a Freedom of Information Act suit, a statement from Ignat Danilchenko, a former SS guard. LaFraniere, *Oversights*, *supra* note 164, at A1. Danilchenko placed Demjanjuk at Sobibor, another death camp, at the time Treblinka survivors said Ivan the Terrible was terrorizing prisoners at Treblinka. *Id.* Identifying Demjanjuk's photograph, Danilchenko gave an account of how the two men herded Jews into Sobibor's gas chambers. *Id.*

166. David Margolick, *Fraud by U.S. is Charged in Nazi-Camp Hearing*, N.Y. TIMES, Aug. 12, 1992, at A12.

167. *Id.*

168. *Id.*

The United States Court of Appeals for the Sixth Circuit ordered the *Demjanjuk* case reopened after learning that old KGB and Soviet war crimes documents, not presented by the Justice Department at Demjanjuk's original extradition hearing, named another Ukrainian, Ivan Marchenko, whose fate remains unknown, as the real Ivan the Terrible.¹⁶⁹ On August 17, 1992, the Sixth Circuit appointed Tennessee federal district court Judge Thomas Wiseman as a special master to determine if the Justice Department fraudulently withheld information about whether Demjanjuk was the Nazi death camp guard Ivan the Terrible.¹⁷⁰ In determining whether the Justice Department engaged in prosecutorial misconduct in its case against Demjanjuk, Judge Wiseman evaluated the government's evidence produced for Demjanjuk's denaturalization, deportation, and extradition.¹⁷¹

On September 1, 1992, the Sixth Circuit denied a request by Demjanjuk's lawyers to allow him to return to the United States if the Israeli Supreme Court ruled that he was not indeed Ivan the Terrible.¹⁷² The appellate court held that Demjanjuk's request was premature since the Israeli court had not yet ruled on the case.¹⁷³ Counsel for the Justice

169. *U.S. Court Reopens Demjanjuk Case*, WASH. TIMES, Aug. 12, 1992, at A2; Sharon LaFraniere, *Justice Dept. Chastised on Demjanjuk*, WASH. POST, Aug. 12, 1992, at A3; *Federal Appeals Court Begins Review of Demjanjuk's Case*, CHI. TRIB., Aug. 12, 1992, at M4; *Appeals Court Questions Demjanjuk Evidence*, CHI. TRIB., Aug. 12, 1992, at C10; *US Court Hears Demjanjuk Evidence that Justice Department Withheld Info*, JERUSALEM POST, Aug. 13, 1992; *It's in Another Court*, LEGAL TIMES, Aug. 17, 1992, at 3; *Demjanjuk Inquiry*, INDEPENDENT (London), Aug. 19, 1992, at 8.

170. Jerry Seper, *Two Courts Weigh 'Ivan' Decisions; Cases Could Put Nations in Conflict*, WASH. TIMES, Aug. 17, 1992, at A1; *Renewed Probe Ordered on Demjanjuk Evidence*, WASH. TIMES, Aug. 18, 1992, at A2; Sharon LaFraniere, *Demjanjuk Prosecutors Face Inquiry: Appeals Court Focuses on Nondisclosure of Evidence in 'Ivan' Case*, WASH. POST, Aug. 18, 1992, at A21; *Demjanjuk Inquiry*, NEWSDAY, Aug. 18, 1992, at 13; David Johnston, *Court Orders Inquiry into Extradition of Man as 'Ivan the Terrible'*, N.Y. TIMES, Aug. 18, 1992, at A16.

171. LaFraniere, *supra* note 170, at A21.

172. *U.S. Won't Let Demjanjuk Return*, TORONTO STAR, Aug. 29, 1992, at A11; Sharon LaFraniere, *U.S. Rules Out Demjanjuk's Repatriation; Justice Dept. Asserts Law Blocks Reentry*, WASH. POST, Aug. 29, 1992, at A3 [hereinafter LaFraniere, *Repatriation*]; Jerry Seper, *Justice Renews Effort to Exclude Demjanjuk*, WASH. TIMES, Aug. 29, 1992, at A1; *Court Rules Against Demjanjuk Re-entry*, WASH. TIMES, Sept. 1, 1992, at A2; *Court Denies Request by Man Called 'Ivan'*, N.Y. TIMES, Sept. 1, 1992, at B6.

173. *U.S. Won't Let Demjanjuk Return*, TORONTO STAR, Aug. 29, 1992, at A11; LaFraniere, *Repatriation*, *supra* note 172, at A3; Jerry Seper, *Justice Renews Effort to Exclude Demjanjuk*, WASH. TIMES, Aug. 29, 1992, at A1; *Court Rules Against Demjanjuk*

Department argued that Demjanjuk could not return to the United States even if the Israeli court overturned his conviction as Ivan the Terrible, because there was mounting evidence that he served as an SS guard at the Sobibor death camp and two concentration camps in Nazi-occupied eastern Poland.¹⁷⁴ The Government's lawyers asserted that Demjanjuk's service as an SS guard at any of the concentration camps was enough to render him ineligible for immigration to the United States.¹⁷⁵

On November 12, 1992, George Parker, a former Justice Department attorney who worked on the *Demjanjuk* case, testified that he believed that Demjanjuk was not Ivan the Terrible, and that he was so troubled by ethical concerns about the government's case against Demjanjuk that he resigned his post after superiors decided to proceed with the case.¹⁷⁶ Parker stated that evidence turned over to the Justice Department by Soviet investigators indicated that another man, Ivan Marchenko, operated the gas chamber and committed the atrocities at the Treblinka death camp in Poland.¹⁷⁷ Although concentration camp survivors identified Demjanjuk as Ivan the Terrible, the Justice Department had accumulated evidence since 1978 that Demjanjuk had been at the Nazi camp in Sobibor, Poland, about fifty miles away.¹⁷⁸ Testimony from Sobibor guards indicated that Demjanjuk worked there with them.¹⁷⁹ Additional evidence included an identification card that belonged to Demjanjuk during World War II.¹⁸⁰ The card placed him at the Nazi's Trawniki SS training camp in 1942, and

Re-entry, WASH. TIMES, Sept. 1, 1992, at A2; *Court Denies Request by Man Called 'Ivan'*, N.Y. TIMES, Sept. 1, 1992, at B6.

174. *U.S. Won't Let Demjanjuk Return*, TORONTO STAR, Aug. 29, 1992, at A11; LaFraniere, *Repatriation*, *supra* note 172, at A3; Jerry Seper, *Justice Renews Effort to Exclude Demjanjuk*, WASH. TIMES, Aug. 29, 1992, at A1; *Court Rules Against Demjanjuk Re-entry*, WASH. TIMES, Sept. 1, 1992, at A2; *Court Denies Request by Man Called 'Ivan'*, N.Y. TIMES, Sept. 1, 1992, at B6; LaFraniere, *Oversights*, *supra* note 164, at A1.

175. LaFraniere, *Repatriation*, *supra* note 172, at A3.

176. *'Ivan the Terrible' Identification Challenged*, N.Y. TIMES, Nov. 13, 1992, at A20; Eric Harrison, *Probe of Nazi War Criminal Case Raises Ethics Questions; Government: A Former Justice Dept. Attorney Said He Resigned Over Handling of Possibly Exculpatory Evidence Concerning the Accused*, L.A. TIMES, Nov. 13, 1992, at A4 [hereinafter Harrison, *Probe*].

177. Harrison, *Probe*, *supra* note 176, at A4.

178. Eric Harrison, *Ex-U.S. Official Denies 'Stonewalling' in Nazi Case*, L.A. TIMES, Nov. 4, 1992, at A2 [hereinafter Harrison, *Stonewalling*].

179. *Id.*

180. *Id.*

it showed that he was posted in Sobibor during March of 1943.¹⁸¹ No documentary evidence has ever placed Demjanjuk at Treblinka, where nearly 900,000 people were executed.¹⁸² Parker also testified that he was troubled because witnesses described Ivan the Terrible as about five feet, eight inches tall, while Demjanjuk is about six feet, one inch.¹⁸³ The evidence, Parker testified, was never made available to Demjanjuk's lawyers,¹⁸⁴ due to the Justice Department's unwritten policy that only specifically requested information be provided to defense attorneys.¹⁸⁵ Since some requests by Demjanjuk's lawyers were denied because they were too broad, Parker testified that he and others in the Justice Department did not improperly withhold evidence.¹⁸⁶ Parker further stated that the government's handling of the case was inappropriate and unethical since it proceeded despite contradictory testimony from witnesses.¹⁸⁷

On November 13, 1992, Martin Mendelsohn, former director of the criminal division of the Justice Department's Office of Special Investigations ("OSI"), the U.S. Justice Department's Nazi-hunting unit, denied charges that the department "stonewalled" Demjanjuk's defense attorneys seeking evidence to exculpate their client.¹⁸⁸ Mendelsohn, who resigned from the OSI in January 1980, stated that George Parker never discussed his reservations about the case with him.¹⁸⁹ He testified that after a failure to obtain a deportation in a Florida case, there had been some pressure from Congress and Israeli officials to step up its hunt for suspected Nazi war criminals hiding in the United States.¹⁹⁰ Mendelsohn acknowledged that the exculpatory evidence was not revealed to Demjanjuk's attorney because he did not specifically ask for it.¹⁹¹ According to both Mendelsohn and Parker, they were abiding by the Federal Rules of Civil Procedure in the denaturalization proceedings rather

181. *Id.*

182. *Id.*

183. *Id.*

184. *'Ivan the Terrible' Identification Challenged*, *supra* note 176, at A20; Harrison, *Probe*, *supra* note 176, at A4.

185. Harrison, *Probe*, *supra* note 176, at A4.

186. *Id.*

187. *Id.*

188. Harrison, *Stonewalling*, *supra* note 178, at A2.

189. *Id.*

190. *Lawyers: Favorable Evidence Withheld from Demjanjuk*, UPI, Nov. 15, 1992, available in LEXIS, News Library, UPI File.

191. *Id.*

than the rules for criminal trials, which require the prosecution to share evidence with the defense.¹⁹² Both Mendelsohn and Parker testified that the OSI did not make any deliberate attempt to defraud the Ohio court in the denaturalization proceeding.¹⁹³

On January 14-15, 1993, two former OSI attorneys Norman A. Moscowitz and John Horrigan denied that they had improperly withheld exculpatory documents from Demjanjuk's lawyers.¹⁹⁴ Both pointed out that Demjanjuk's denaturalization proceeding was a civil action, which does not require the kind of disclosure as a criminal case.¹⁹⁵ In direct contradiction with former colleague George Parker's testimony, Moscowitz and Horrigan stated that they had never doubted that Demjanjuk was "Ivan the Terrible."¹⁹⁶ Moscowitz felt that the accounts from the Jewish survivors of the Treblinka death camp who identified pictures of Demjanjuk were more credible than the newly surfaced evidence.¹⁹⁷

Allan A. Ryan, Jr., and Bruce Einhorn, were the last witnesses scheduled to testify before Judge Wiseman's hearings.¹⁹⁸ On January 30, 1993, Ryan, the former head of OSI, defended his actions and those of the lawyers under him who prosecuted Demjanjuk by stating that they did not deliberately withhold exculpatory evidence from Demjanjuk's lawyers.¹⁹⁹ On February 5, 1993, another former OSI lawyer, Bruce Einhorn, testified that he never saw any of the documents which would have allegedly exculpated Demjanjuk.²⁰⁰

On February 2, 1993, Ohio Congressman James Traficant, who has long argued that Demjanjuk was erroneously convicted as Ivan the Terrible, contended that Marchenko, the real Ivan, was alive and would

192. *Id.*

193. *Id.*

194. Ronald Smothers, *Lawyer Recalls No Doubt on Nazi Guard*, N.Y. TIMES, Jan. 15, 1993, at A11 [hereinafter Smothers, *Nazi*]; Ronald Smothers, *'Ivan the Terrible' Ruling Is Expected by May*, N.Y. TIMES, Jan. 17, 1993, § 1, at 17 [hereinafter Smothers, *Ivan*].

195. Smothers, *Ivan*, *supra* note 194, at 17.

196. *Id.*

197. Smothers, *Nazi*, *supra* note 194, at A11.

198. Matthew Brelis, *Ex-U.S. Official Defends Demjanjuk Prosecution*, BOSTON GLOBE, Jan. 30, 1993, at 15 [hereinafter Brelis, *Ex-Official Defends*]; L.A. Judge Denies Suppressing Evidence in 'Ivan the Terrible' Case, L.A. TIMES, Feb. 6, 1993, at B3 [hereinafter *Judge Denies*].

199. Brelis, *Ex-Official Defends*, *supra* note 198, at 15.

200. *Judge Denies*, *supra* note 198, at B3.

be brought to justice soon.²⁰¹ According to Traficant, an investigation by his staff revealed that Marchenko was in his eighties and living in Eastern Europe.²⁰² Traficant also released two recently obtained statements by Treblinka survivors who identified Marchenko during 1951 interviews as Ivan the Terrible.²⁰³ Traficant stated that the documents were obtained by Israeli investigators.²⁰⁴

In July 1993, Special Master Wiseman ruled that the Justice Department lawyers had erred when they investigated the background of Demjanjuk.²⁰⁵ However, Wiseman held that the errors did not invalidate the deportation or denaturalization of Demjanjuk, despite substantial evidence that someone else may have been the real Ivan the Terrible.²⁰⁶ Wiseman stated that although Soviet evidence casted a substantial doubt on the Government's longstanding assertion that Demjanjuk was Ivan the Terrible, there was evidence indicating that he worked as an SS guard at Nazi Germany's death camp guard training facility at Trawniki, which provided sufficient justification for his 1981 denaturalization and 1986 deportation to Israel.²⁰⁷ Furthermore, Demjanjuk attempted to conceal his Nazi wartime activities when he entered the United States in the 1950s.²⁰⁸ Wiseman concluded that the Federal prosecutors who stripped Demjanjuk of his American citizenship and obtained an order to deport him acted in good faith and did not break the law or intentionally conceal evidence that would have cleared Demjanjuk of war crimes.²⁰⁹ However, the prosecutors were not skeptical enough in handling the case and failed to pursue leads contradicting the theory that Demjanjuk was the murderous Ivan of the Treblinka extermination camp.²¹⁰

On July 29, 1993, the Israeli Supreme Court overturned Demjanjuk's 1988 conviction and death sentence on the basis that there was "reasonable

201. Jerry Seper, *Traficant Hopes to Nab Nazi; 'Real' Ivan Said to Live in Europe*, WASH. TIMES, Feb. 3, 1993, at A3.

202. *Id.*

203. *Id.*

204. *Id.*

205. Robert L. Jackson & Ronald J. Ostrow, *Judge Cites U.S. Errors in Demjanjuk Case; 'Irrelevant,' Israel Says*, L.A. TIMES, July 1, 1993, at A6.

206. *Judge Casts Doubt on 'Ivan' Case*, CHI. TRIB., July 1, 1993, at N4.

207. Jackson & Ostrow, *supra* note 205, at A6.

208. David Johnston, *Doubt Cast on Identification of Nazi Guard 'Ivan,'* N.Y. TIMES, July 1, 1993, at A1.

209. *Id.*

210. *Id.*

doubt" that he was the sadistic Ivan the Terrible.²¹¹ The reasonable doubt was based on documents unearthed in archives of the former Soviet Union.²¹² The Israeli court questioned the validity of the witnesses' identification of Demjanjuk as the sadist who beat and maimed naked Jews as he herded them into the gas chambers.²¹³ In 1991, three years after Demjanjuk's Israeli conviction, his family acquired KGB records of statements from former Treblinka guards who identified another Ukrainian, Ivan Marchenko (whose fate remains unknown), as Ivan the Terrible.²¹⁴ The Israeli court wrote, "[w]e do not know how these statements came into the world and who gave birth to them, but when they came before us, doubt began to gnaw away at our judicial conscience; perhaps the appellant was not Ivan the Terrible."²¹⁵

Despite Demjanjuk's insistence that he served as a soldier in the Soviet Army until 1942, when he was captured by the Nazis, and spent the rest of the war as a prisoner, the Israeli Supreme Court cited substantial documentary evidence that he underwent SS training and became a guard at the Sobibor death camp, where approximately 250,000 Jews were exterminated.²¹⁶ The Israeli judges refused to convict Demjanjuk on those grounds since a retrial might violate the basic judicial principle that a defendant cannot be prosecuted twice on the basis of the same evidence.²¹⁷ Furthermore, Demjanjuk was stripped of his U.S. citizenship and extradited to Israel specifically to stand trial for being Ivan the Terrible—not for other Nazi genocidal crimes.²¹⁸ If the Israeli Supreme Court charged Demjanjuk for separate offenses, it would be in violation of its extradition treaty with the United States.²¹⁹

In September 1993, Demjanjuk returned to the United States (to an undisclosed location in Ohio) after more than seven years in Israel fighting

211. Chris Hedges, *Israel Court Sets Demjanjuk Free, But He Is Now Without a Country*, N.Y. TIMES, July 30, 1993, at A1.

212. Chris Hedges, *Israel Recommends That Demjanjuk Be Released*, N.Y. TIMES, Aug. 12, 1993, at A15.

213. Sam Seibert, *Maybe He Wasn't the Nazis' Ivan the Terrible—But What Was He?*, NEWSWEEK, Aug. 9, 1993, at 49.

214. *Id.*

215. *Id.*

216. *Id.*

217. Richard Beeston, *Israel's Law Chief Rejects Call for Demjanjuk Retrial*, THE TIMES (London), Aug. 12, 1993.

218. *Id.*

219. *Id.*

war crime charges.²²⁰ After the Israeli Supreme Court overturned Demjanjuk's conviction in July of 1993, it heard and rejected petitions of a second conviction from Holocaust survivors and Nazi hunters who were appalled that he was being freed.²²¹ In August of 1993, the U.S. Court of Appeals for the Sixth Circuit in Cincinnati issued an order barring the Justice Department from banishing Demjanjuk out of the country or interfering with his freedom.²²² Demjanjuk is now technically an illegal alien subject to deportation for serving as an SS auxiliary guard at the Trawniki training camp in Nazi-occupied Poland during 1942.²²³ Because there is no provision in the law of the United States for war crimes, he cannot be indicted for such actions.²²⁴ Demjanjuk's lawyers have already taken steps to regain his American citizenship.²²⁵

On November 17, 1993, a three-judge panel of the Sixth Circuit revoked Demjanjuk's 1986 extradition order on the grounds that Justice Department lawyers committed "fraud on the court" and engaged in prosecutorial misconduct when they accused Demjanjuk of being Ivan the Terrible.²²⁶ In a stinging rebuke of the Justice Department, the three-judge panel concluded that its lawyers displayed a "win at any cost" attitude by failing to disclose to the courts and to the petitioner exculpatory evidence in their possession that might have cleared Demjanjuk of the charges.²²⁷ The Sixth Circuit's findings will have no direct impact on Demjanjuk's current legal standing (the court did not restore Demjanjuk's citizenship) and do not affect separate court rulings in Demjanjuk's denaturalization and citizenship proceedings, both of which were in part based on evidence that he also served at Nazi extermination camps other than Treblinka.²²⁸

The Sixth Circuit found that OSI lawyers had committed "fraud on the court because by recklessly assuming Demjanjuk's guilt, they failed to

220. Clyde Haberman, *September 19-25: Demjanjuk Back in U.S.; 'Ivan' the Interminable Case Ends, at Least for Israel*, N.Y. TIMES, Sept. 26, 1993, § 4 (Week in Review), at 2.

221. *Id.*

222. Bill Sloat, *U.S. Won't Seek Arrest*, PLAIN DEALER, Sept. 25, 1993, at 1B.

223. *Id.*

224. *Id.*

225. Stephen Labaton, *Demjanjuk's Lawyers Seek Return of U.S. Citizenship*, N.Y. TIMES, Sept. 4, 1993, § 1 (National Desk), at 6.

226. Michael Isikoff, *Appellate Panel Rebukes Justice Dept. on Demjanjuk*, WASH. POST, Nov. 18, 1993, at A1.

227. *Id.*

228. *Id.*

observe their obligation" to provide the defense with evidence in their possession that could have proven Demjanjuk's innocence.²²⁹ The evidence included statements given to former Soviet Union officials by two Treblinka guards, who identified another man, Ivan Marchenko, as Ivan of Treblinka.²³⁰ Furthermore, OSI attorneys failed to disclose conflicting statements from a German guard questioned by department lawyers about whether Demjanjuk was Ivan and a list of Ukrainian guards at Treblinka provided by the Polish government on which Marchenko's name, not Demjanjuk's, appeared.²³¹ The three-judge panel disregarded Special Master Wiseman's finding that the department lawyers acted in good faith, concluding instead that "OSI attorneys acted with reckless disregard for the truth."²³² The appellate decision suggested that OSI may have succumbed to pressure from organized Jewish groups and criticized the OSI's relationship with special-interest groups, stating that, "[i]t is obvious from the record that the prevailing mindset at OSI was that the office must try to please and maintain very close relationships with various interest groups because [the office's] continued existence depended on it."²³³ It is unlikely that the OSI attorneys chastised by the Sixth Circuit for their handling of the Demjanjuk case will face any sanctions beyond the stinging language of the opinion due to tangled jurisdictional issues and the wide latitude traditionally accorded prosecutors.²³⁴ Moreover, two of the Justice Department lawyers who worked on the case, Allan A. Ryan, Jr., the former head of OSI, and Norman Moscovitz, an assistant in the office, have since left the department.²³⁵ The Sixth Circuit decision is unlikely to change the OSI since it is expected to disband by the end of the decade as the remaining criminals of World War II die off.²³⁶

On December 30, 1993, the Justice Department asked two courts to uphold its actions that denaturalized Demjanjuk and extradited him to Israel.²³⁷ The Justice Department moved to reopen U.S. District Judge

229. Michael Hedges, *Court Dismisses Demjanjuk Case, Rebukes Justice*, WASH. TIMES, Nov. 18, 1993, at A3.

230. Isikoff, *supra* note 226, at A1.

231. *Id.*

232. *Id.*

233. Hedges, *supra* note 229, at A3.

234. David Margolick, *Punish Demjanjuk's Prosecutors? Not Likely*, N.Y. TIMES, Nov. 19, 1993, at A30.

235. *Id.*

236. Stephen Labaton, *Nov. 14-20: Recriminations in the U.S.; In the Demjanjuk Case, Bitterness Begets Bitterness*, N.Y. TIMES, Nov. 21, 1993, at 2.

237. *U.S. Wants Rulings Against Demjanjuk Upheld*, CHI. TRIB., Dec. 31, 1993, at

Frank J. Battisti's 1981 order denaturalizing Demjanjuk and requested that Battisti reaffirm his 1981 ruling that Demjanjuk had misrepresented his past when he applied for U.S. citizenship (such misrepresentation was itself the basis for Battisti's 1981 order stripping Demjanjuk of his citizenship).²³⁸ Attorney General Janet Reno decided to reopen the citizenship proceeding to insure that Demjanjuk would be given a fair hearing on his contentions that he had never served as a Nazi guard and that he had been falsely accused by the OSI of committing war crimes.²³⁹ Reno stated, "[w]hile our objective is still to bring about Mr. Demjanjuk's prompt removal from the United States, we want there to be no doubt in any reasonable person's mind that Mr. Demjanjuk served in Nazi death camps and concealed that fact when he applied to become a U.S. citizen."²⁴⁰ The Justice Department stated in its motion to Battisti that the new evidence uncovered by Israeli prosecutors, while casting substantial doubts on Demjanjuk's identity as Ivan the Terrible, strengthens the OSI's allegations that Demjanjuk did serve at Trawniki, a Nazi SS facility where death camp guards were trained to assist in the exterminations of Jews.²⁴¹ Department lawyers contended that they have original Nazi documents discovered in West German, Lithuanian, and Soviet archives that contain Demjanjuk's name and the number found on the disputed Trawniki identification card.²⁴² They also cited a January 20, 1943, report signed by a sergeant in Trawniki that documents a guard named "Deminjuk" was disciplined for leaving camp.²⁴³ According to accounts in German news magazines, German police officials decided that the identification card is a forgery.²⁴⁴

Government lawyers also appealed to the full panel of the U.S. Court of Appeals for the Sixth Circuit the three-judge panel's November 17th ruling that accused the government of fraud in its prosecution of

N4.

238. *Id.*

239. Stephen Labaton, *U.S. Recasts Demjanjuk as it Seeks to Oust Him*, N.Y. TIMES, Dec. 31, 1993, at 13.

240. *Id.*

241. Michael Isikoff, *Justice Dept. Asks Judge for a New Opportunity to Link Demjanjuk, Nazis*, WASH. POST, Dec. 31, 1993, at A13.

242. *Id.*

243. *Id.*

244. Michael Hedges, *Reno Seeks 2nd Chance to Extradite Demjanjuk*, WASH. TIMES, Dec. 31, 1993, at A1.

Demjanjuk.²⁴⁵ The major premise of the appeal is that the three-judge panel had lowered the standard of fraud.²⁴⁶ In finding that OSI prosecutors committed fraud on the court, the three-judge panel applied a standard of recklessness instead of a higher standard of intentional misconduct.²⁴⁷

Noticeably absent from briefs filed simultaneously in the Federal District Court in Cleveland and in the U.S. Court of Appeals for the Sixth Circuit was the accusation that Demjanjuk was Ivan the Terrible.²⁴⁸ After nearly seventeen years of investigations, the Justice Department has now abandoned its long-held assertion that Demjanjuk was Ivan the Terrible and will simply contend that he was a guard at other Nazi extermination camps like Sobibor, Flossenburg, and Regensburg, and that he trained as an SS guard at Trawniki.²⁴⁹ Neither Battisti nor the Court of Appeals for the Sixth Circuit immediately ruled on the rehearing requests.²⁵⁰ The Sixth Circuit said that it would be at least two weeks before it would rule since the rehearing request has to be circulated to the court's fifteen judges.²⁵¹

Although John Demjanjuk has been cleared by the Israeli Supreme Court of committing war crimes as Ivan the Terrible at Treblinka, the same court cited compelling evidence that he had served as a guard at other Nazi death camps. The Justice Department's voluntary reopening of the original denaturalization proceedings will allow the court to review the case without the Ivan the Terrible materials. If the government succeeds in proving that he was a Nazi extermination camp guard anywhere else, such as Sobibor, it will highlight the fact that he lied about his Nazi past to get into the United States, and thus, he should be deported.

The Israeli Supreme Court questioned the validity of the sworn testimony of six Treblinka survivors in overturning Demjanjuk's conviction and death sentence. The eyewitness testimony provided the strongest evidence against Demjanjuk, despite the fact that about forty years had elapsed since these survivors had last laid eyes on Ivan the Terrible. Eyewitnesses' memories after more than forty years from the

245. *U.S. Wants Rulings Against Demjanjuk Upheld*, *supra* note 237, at N4.

246. *Labaton*, *supra* note 239, at 13.

247. *Id.*

248. *Id.*

249. *Id.*

250. *U.S. Wants Rulings Against Demjanjuk Upheld*, *supra* note 237, at N4.

251. *Id.*

time the war crimes occurred can be subject to lapses, rendering eyewitness testimony to long-ago events highly unreliable.

One's looks can change after ten years. After forty years, eyewitness testimony is extremely questionable, which highlights the need to apply rigorous proof standards to war crime trials. The government's burden to only find "probable cause" or "reasonable grounds" to render the individual guilty of the crime charged and the court's reliance on eyewitness testimony as admissible evidence fail to protect Demjanjuk's due process rights. The Sixth Circuit admitted that other than the eyewitness affidavits and photographs that were available in this case, there were no physical or scientific evidence such as fingerprints, blood samples, dental records, or voice recordings due to the destruction of the concentration camps and the passage of time. This absence of physical and scientific evidence should elevate the prosecutor's burden to find more than "probable cause" or "reasonable grounds" to find an individual guilty of genocide and certifiable for extradition. The United States Supreme Court has professed, as a fundamental value of our democratic society, that "it is far worse to convict an innocent man than to let a guilty man go free."²⁵² If the evidentiary standard that the OSI is subjected to is not guilt beyond a reasonable doubt, but only the preponderance of evidence, then there is the risk that the OSI could possibly convict, deport, and extradite innocent people.

It is unlikely that there will be many more Holocaust war criminals to be tried in the coming years, due to the passing away of many of the Holocaust survivors and criminals. However, the fact that the government is only required to meet a lenient standard of evidence, combined with the possibility of prosecutorial misconduct, will have significant due process ramifications for all individuals who may be erroneously denaturalized, deported, or extradited. It will also have due process implications for any American who takes pride in our judiciary system.

Annie Fung

252. *In re Winship*, 397 U.S. 358, 372 (1970).